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No. ____

IN THE

Supreme Court of the United States

ROBIN PASSARO LOUQUE, Individually and on Behalf of All Others Similarly Situated,

Petitioners,

v.

ALLSTATE INSURANCE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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April 21, 2003

QUESTION PRESENTED

In *Free v. Abbott Laboratories*, 529 U.S. 333 (2000), this Court granted review to address an important question on which the courts of appeals are in conflict regarding the scope of diversity jurisdiction in small-claims class actions. The Court affirmed the Fifth Circuit's decision in *Free* by a four-four vote, with Justice O'Connor not participating, and thus was unable to resolve the question presented. The circuits are more deeply divided on that question now than they were at the time the Court granted certiorari in *Free*. This case presents exactly the same question as presented in *Free*:

> Whether the supplemental jurisdiction statute, 28 U.S.C. § 1367, overrules *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), and thus expands federal subject matter jurisdiction in a class action to encompass class members whose claims do not satisfy the amount-in-controversy requirement of 28 U.S.C. § 1332, as long as diversity jurisdiction exists over the claims of one named plaintiff.

PARTIES

The caption includes all of the named parties. Petitioner Robin Passaro Louque was the named plaintiff and appellant below. Respondent Allstate Insurance Company was defendant and appellee below. Petitioner Louque is the class representative for a class of Allstate insureds who are also petitioners before this Court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Robin Passaro Louque, and a class of all others similarly situated, respectfully petition this Court for a writ of certiorari to review the judgment below of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Fifth Circuit is reported at 314 F.3d 776 (5th Cir. 2002), and is reproduced in the appendix at 1a. The Fifth Circuit's unreported order denying petitioners' petition for rehearing is reproduced in the appendix at 25a. The opinion of the United States District Court for the Eastern District of Louisiana is unofficially reported at 2001 WL 736759 (E.D. La. June 27, 2001), and is reproduced in the appendix at 16a.

JURISDICTION

The judgment of the Fifth Circuit affirming the denial of petitioners' motion to remand this action to state court and the dismissal of petitioners' class action petition was entered on December 13, 2002. Pet. App. 1a. Petitioners' timely petition for rehearing was denied on January 24, 2003. Pet. App. 25a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

28 U.S.C. § 1332 provides, in relevant part:

Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter

in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between —

(1) citizens of different States . . . .

28 U.S.C. § 1441 provides, in relevant part:

Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. § 1367, provides in relevant part:

Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of

additional parties.

> (b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

STATEMENT OF THE CASE

This class action presents claims arising solely under state law. The named plaintiff, petitioner Robin Louque, filed the action in Louisiana state court on behalf of herself and all those similarly situated. The defendant, respondent Allstate Insurance Company, removed the class action to federal district court on the basis of diversity of citizenship under 28 U.S.C. §§ 1441(a) and 1332(a)(1). It is undisputed that the unnamed class members do not individually have $75,000 in controversy, as is generally required to establish diversity jurisdiction under section 1332(a). However, the district court assumed jurisdiction over the class members' claims on the strength of the Fifth Circuit's prior ruling in *In re Abbott Laboratories*, 51 F.3d 524 (5th Cir. 1995) ("*Abbott Labs*"), *aff'd by an equally divided court sub nom. Free v. Abbott Laboratories*, 529 U.S. 333 (2000).

Abbott Labs held that the federal supplemental jurisdiction statute enacted in 1990, 28 U.S.C. § 1367, overruled this Court's decision in *Zahn v. International Paper Co.*, 414 U.S. 291 (1973). *Zahn* held that to meet the requirements for diversity jurisdiction under 28 U.S.C. § 1332(a)(1) in a class action, the claims of each class member, including the unnamed members of the class, must exceed the statute's amount-in-controversy threshold. In *Abbott Labs*, this Court granted review to decide whether *Zahn* survived the enactment of section 1367. The Court affirmed the Fifth Circuit's ruling by a four-to-four vote, without opinion, and thus it was unable to resolve that important question. This petition presents the Court with the opportunity to do so.

1. Petitioner Louque, a citizen of Louisiana, filed a Class Action Petition for Damages on March 16, 2001, in the Twenty-First Judicial District Court of Tangipahoa Parish, Louisiana. The petition explained that Louque had been involved in a car accident in which the other motorist was injured and thereafter sued Louque in Louisiana state court. Respondent Allstate, Louque's insurer, defended the action and refused to settle it. Judgment was entered for the injured motorist for more than $7,500 in damages, plus $5,000 in statutory penalties for failure to make a reasonable offer to settle, as required by La. Stat. Ann. § 22:1220. Respondent paid the damages judgment, but successfully appealed the statutory penalties. The judgment against Louque became a public record and thus was available to creditors, credit reporting agencies, and the like. Class Action Petition ¶¶ 3-8; Pet. App. 2a.

In their state court class action petition, petitioners alleged that respondent has a general policy not to settle minor-

impact, soft-tissue injury ("MIST") claims where the claimant is represented by a lawyer, even when respondent believes the case is meritorious and would result in a judgment greater than could be negotiated in settlement, in a concerted effort to discourage claimants from retaining counsel. Pet. App. 2a; *see* Class Action Petition ¶¶ 12-17 (describing policy in some detail). Petitioners alleged that this no-settlement policy was pursued even in cases where respondent knew that it would harm its own insureds because "the resulting delays and judgments adversely affected Allstate policy holders' creditworthiness." Pet. App. 2a; *see also* Class Action Petition ¶¶ 8-10 (describing how judgment harmed Louque's credit).[1]

Petitioners alleged that respondent's policy regarding non-settlement of MIST claims violated the plain language of their contracts of insurance, constituted a breach of fiduciary duty, and violated La. Stat. Ann. § 22.1220, which imposes on insurers a "duty of good faith and fair dealing," including a duty to make a reasonable effort to settle claims. Pet. App. 2a; Class Action Petition ¶¶ 18-20. Petitioners alleged that respondent's policy had harmed their creditworthiness (*id.* ¶ 18), and each class member so harmed demanded compensatory damages and statutory damages. *Id.* ¶¶ 19-21. The class action petition explicitly disavowed damages in excess of $75,000 for any class member. *Id.* ¶ 1.

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[1]The class was defined to include all persons with automobile insurance issued by respondent where (1) the insured was involved in an automobile accident, (2) the insured was sued as a result of that accident; and (3) a judgment rendered against the insured within policy limits was paid by respondent, which judgment appeared on the insured's credit report. Class Action Petition ¶ 23.

On April 26, 2001, respondent, a citizen of Illinois, removed the case to the United States District Court for the Eastern District of Louisiana on the basis of 28 U.S.C. §§ 1332, 1441, and 1367. Notice of Removal (Doc. 1). Respondent noted that there was diversity between the named parties, and it alleged that "the amount in controversy as to the named plaintiff [Louque]" exceeded $75,000, as required for establishing diversity jurisdiction under 28 U.S.C. § 1332(a). In arguing that Louque had the requisite amount in controversy, respondent relied on provisions of Louisiana insurance law that it contended would entitle petitioner Louque (if the suit was successful) to an award of attorney's fees in the class action that, respondent maintained, would exceed $75,000. Notice of Removal, at 3-4.

As to the unnamed class members, respondent did not maintain (and has never since contended) that they individually had the requisite amount in controversy. Rather, respondent asserted that the court had supplemental jurisdiction over them based solely on the fact that the "representative plaintiff ... satisfies the jurisdictional amount," *id.* at 5, relying on the Fifth Circuit's decision in *Abbott Laboratories*. Petitioners promptly moved to remand the class action to state court on the ground that attorney's fees are not available under the Louisiana statutes upon which respondent relied.

Respondent, meanwhile, moved to dismiss the class action for failure to state a claim upon which relief could be granted under Fed. R. Civ. P. 12(b)(6). In that motion, respondent argued principally that the contract of insurance that it had entered into with each of the petitioners gave it the right to settle (or not settle) third-party claims whenever it chose. Motion to Dismiss at 10 (Doc. 6).

2. In an order entered on June 28, 2001, the district court denied petitioners' motion to remand, granted respondent's motion to dismiss, and entered judgment for respondent. The court agreed with respondent that attorney's fees were available to petitioner Louque under Louisiana law, and that, because Louque had sought relief on behalf of thousands of class members, her "attorneys' fees will easily exceed the $75,000 jurisdictional threshold." Pet. App. 19a. Moreover, of particular relevance here, the court ruled that, "in accordance with the Fifth Circuit's holding in *Abbott Laboratories*," it would "exercise supplemental jurisdiction over the claims of the remaining putative class members under 28 U.S.C. § 1367." Pet. App. 19a-20a (citation omitted). On the merits, the district court agreed with respondent, principally on the ground that the insurance contract gave respondent complete discretion whether or not to settle claims. The court therefore dismissed the suit. Pet. App. 23a-24a.

3. The Fifth Circuit affirmed in all respects. Pet. App. 1a. First, it agreed that the relevant Louisiana insurance statutes "presently afford a basis for recovery of attorney's fees for an insured" (Pet. App. 9a), and that, therefore, the amount-in-controversy requirement was met for petitioner Louque. Second, relying on its decision in *Abbott Laboratories*, the court of appeals ruled that "through its exercise of supplemental jurisdiction," the district court had jurisdiction "over the claims of the class." Pet. App. 11a (citing 28 U.S.C. § 1367). Finally, on the merits, the court affirmed the dismissal of the complaint on the basis of the district court's opinion. Pet. App. 12a.[2]

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[2]Judge Barksdale filed a special concurrence stating that he had "some misgivings" about whether the jurisdictional amount could be met by virtue of a claim for attorney's fee under the (continued...)

Petitioner filed a timely petition for panel rehearing with respect to both the jurisdictional issue and the merits. That petition was denied on January 24, 2003.

REASONS FOR GRANTING THE WRIT

This Petition Presents A Deep Conflict Among The Circuit Courts On An Important Question Of Federal Law.

1. The Fifth Circuit's view, first enunciated in *Abbott Labs*, that section 1367 overruled *Zahn* has been followed by the Fourth, Seventh, and Ninth Circuits, but has been rejected by the Third, Eighth, and Tenth Circuits. *Compare Abbott Labs*, 51 F.3d at 529 ("under § 1367 a district court can exercise supplemental jurisdiction over members of a class, although they did not meet the amount-in-controversy requirement, as did the class representatives"); *Rosmer v. Pfizer Inc.*, 263 F.3d 110 (4th Cir. 2001) (same), *cert. dismissed*, 123

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[2](...continued)
relevant Louisiana insurance statutes. Pet. App. 15a. However, in light of the Fifth Circuit's recent decision in *Grant v. Chevron Phillips Chemical Co.*, 309 F.3d 864 (5th Cir. 2002), *cert. denied*, ___ S. Ct. ___, 2003 WL 327444 (Mar. 31, 2003), holding that requests for attorney's fees under Louisiana's general-purpose class action statute are attributable to the named plaintiff for amount-in-controversy purposes, Judge Barksdale noted that the attorney's fee issue under the Louisiana insurance statutes would not likely arise again. The petition for a writ in certiorari in *Grant* focused exclusively on the issues regarding attribution of attorney's fees under Louisiana law and did not raise the *Zahn* issue presented by this petition. *See* Petition in No. 02-1140 (filed Jan. 9, 2003).

S. Ct. 14 (2002); *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599 (7th Cir. 1997) (same); *Stromberg Metal Works, Inc.*, 77 F.3d 928, 930-33 (7th Cir. 1996) (following *Abbott Labs* in a case involving joinder under Fed. R. Civ. P. 20); *Gibson v. Chrysler Corp.*, 261 F.3d 927 (9th Cir. 2001) (same in Rule 23 context), *cert. denied sub nom., DaimlerChrysler Corp. v. Gibson*, 534 U.S. 1104 (2002), *with Meritcare Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214 (3d Cir. 1999) (*Zahn* survives enactment of section 1367); *Trimble v. Asarco, Inc.*, 232 F.3d 946, 962 (8th Cir. 2000) (same); *Leonhardt v. Western Sugar Co.*, 160 F.3d 631, 640-41 (10th Cir. 1998) (same). This split in authority is both deep and mature (and even deeper and more mature than when the Court granted review in *Abbott Labs*), and it warrants this Court's attention now.[3]

The argument that *Zahn* was overruled by section 1367 can be stated rather simply. First, section 1367(a) provides that "in any civil action of which the district courts have original jurisdiction," the district courts shall have "supplemental jurisdiction over all other claims that are so related to" the claims within the courts' original jurisdiction as to constitute "the same case or controversy under Article III." Second, under section 1367(b), "the district courts shall not have supplemental jurisdiction under subsection (a)" over claims to

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[3]This Court's denial of certiorari last Term in *Gibson* does not suggest that the *Zahn* issue is not worthy of review. *Gibson* held that section 1367 overruled *Zahn*, but then went on to conclude that the *named plaintiff's* claims did not satisfy the amount in controversy requirement, thus precluding federal jurisdiction regardless of which way the *Zahn* issue was resolved. *See Gibson*, 261 F.3d at 940-43. The *Zahn* issue was therefore not squarely presented to this Court in *Gibson*.

join or add parties under Federal Rules of Civil Procedure 14 (third party practice), 19 (necessary joinder), 20 (permissive joinder), and 24 (intervention). Thus, the argument goes, because Rule 23 (class actions) is not among the rules excluded under section 1367(b), if one named plaintiff in a class action is diverse from the defendant and has the requisite amount in controversy, the absent class members are within the "supplemental jurisdiction" of the district court under section 1367(a). *See, e.g., Gibson*, 261 F.3d at 934; *Rosmer*, 263 F.3d at 114-15.

The principal error in this argument is that it wrongly assumes that class actions involve assertions of "supplemental jurisdiction" described in 28 U.S.C. § 1367(a). In fact, historically, unnamed class members were not viewed as "supplemental" to the original action and, thus, the supplemental jurisdiction statute was not intended to affect class actions one way or the other. As Judge Niemeyer has put it, "[u]nlike the other forms of aggregation permitted under the Federal Rules—impleader, joinder, and intervention—Rule 23 is not a mechanism to add parties. In a class action, both the parties and the class members whom the parties purport to represent are already 'in' the action." *Rosmer v. Pfizer Inc.*, 272 F.3d 243, 250 (4th Cir. 2001) (Niemeyer, J., dissenting from denial of rehearing en banc). Put in section 1367's terms, a class action does not come within the district court's "original jurisdiction" unless the named plaintiffs *and* the unnamed class members have the minimum amount in controversy required by 28 U.S.C. § 1332(a). That, after all, is the holding of *Zahn,* and section 1367 does not purport to alter or even define the "original jurisdiction" of the district courts. Thus, because a district court does not have "original jurisdiction" in a case where the absent class members do not have the requisite amount in controversy, the question of what types of

supplemental claims are excepted from coverage—the question addressed in section 1367(b)—is simply never reached in class actions. *See Rosmer*, 263 F.3d at 127 (Motz, J., dissenting).

There are other reasons, based on the text and purpose of section 1367, that explain why section 1367 does not overrule the historical understanding of section 1332 enunciated in *Zahn*. *See, e.g., Rosmer*, 272 F.3d at 250-51 (Niemeyer, J., dissenting from denial of rehearing en banc) (claims of various class members in Rule 23(b)(3) class actions not part of the "same" Article III case or controversy within the meaning of section 1367(a)); *Leonhardt*, 160 F.3d at 640 (upholding *Zahn* based in part on language of section 1367(b) forbidding exercise of supplemental jurisdiction that is "inconsistent with the jurisdictional requirements of section 1332"); *Trimble*, 232 F.3d at 962 (same); *Rosmer*, 263 F.3d at 127 (Motz, J., dissenting) (interpreting section 1367 to overrule *Zahn* "utterly conflicts with the steadfast Congressional policy of restricting, rather than expanding, diversity jurisdiction.").[4]

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[4]The legislative history of section 1367 states that the statute was "not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions" and specifically cites *Zahn* as one of these requirements. H.R. Rep. No. 101-734, *reprinted in* 1990 U.S.C.C.A.N. 6860, 6875 & n.17. Even some courts that have held that *Zahn* was overruled by section 1367 acknowledge that the legislative history shows that Congress intended to retain the *Zahn* rule. *See, e.g., Gibson*, 261 F.3d at 939 (legislative history citing *Zahn* "strongly suggest[s] that the proposed statute was intended to preserve the outcome in that case."). *See also Russ v. State Farm Mut. Auto Ins. Co.*, 961 F. Supp. 808, 820 (E.D. Pa. 1997) (Pollak, J.) (characterizing court ruling that section 1367 overrules *Zahn* as follows: "We

(continued...)

If this Court grants review, there will be time enough to set forth all of these arguments in detail. For present purposes, however, the key point is that there is a deep conflict among the circuits on a recurring issue of federal law that demands this Court's attention.

2. The question presented has not only deeply divided the lower courts, but it is important, as this Court apparently believed just a few years ago when it granted review in *Abbott Labs*. In the circuits where *Zahn* no longer prevails, a single plaintiff is now able to maintain a federal-court class action that presents only state-law claims against a diverse defendant whenever the value of that plaintiff's claims exceeds the jurisdictional amount, no matter how small the value of all the other class members' claims may be. Similarly, a defendant can remove the same class action, filed in state court, to federal court.

In Louisiana, for instance, under the Fifth Circuit's decisions in *Abbott Labs* and its progeny (*see supra* note 2), any state-law diversity class action in which the aggregate potential attorney's fee plausibly exceeds $75,000 may be litigated in federal court, even if no class member's claim (let alone all of the class members' claims) on the merits is worth more than a few hundred dollars. This result flies in the face of the amount-in-controversy requirement and the purpose of the non-aggregation rule upheld in *Zahn*: to prevent "the transfer into the federal courts [of] numerous local controversies involving exclusively questions of state law." *See Rosmer*, 263 F.3d at

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[4](...continued)
know what you meant to say, but you didn't quite say it. So the message from us in the judicial branch to you in the legislative branch is: 'Gotcha! And better luck next time.'").

127 n.3 (Motz, J., dissenting) (quoting *Snyder v. Harris*, 394 U.S. 332, 340 (1969)); *Rosmer*, 272 F.3d at 248 (Niemeyer, J., dissenting from denial of rehearing en banc) (noting that, absent the rule in *Zahn*, "virtually *every* class action under state law may be brought in federal court because only one claimant needs to satisfy the jurisdictional requirements of § 1332.") (emphasis in original).[5]

More fundamentally, the decision below and others like it upset the federal-state balance because they place before federal courts issues of state law that are properly the province of the state courts. In this case, for instance, the courts below opined on important issues of Louisiana contract and insurance law that petitioners believe are matters for the Louisiana courts. Similarly, in *Abbott Labs*, the Fifth Circuit opined on novel issues of state antitrust law. *Free v. Abbott Laboratories*, 176 F.3d 298 (5th Cir. 1999). In short, the effect of the ruling below is "to amplif[y] manyfold the circumstances in which diversity jurisdiction is available, [and] increase[] vastly the power of federal class actions, all at the expense of the states' long-standing privilege to decide state-law cases in their own courts." *Rosmer*, 272 F.3d at 253 (Niemeyer, J., dissenting from denial of rehearing en banc). That situation should not persist without this Court's blessing.

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[5]The question whether section 1367 overruled *Zahn* is also important because it arises frequently. In addition to the seven circuits that have opined on the question, a large number of reported (and similarly divided) district court decisions have addressed it as well. *See generally* 13 Wright, Miller, Cooper & Freer, *Federal Practice and Procedure* § 3523.1 nn. 74-76 (Supp. 2002) (citing cases).

CONCLUSION

In *Free v. Abbott Laboratories*, this Court was poised to decide whether supplemental jurisdiction can be asserted over class members who do not have the requisite amount in controversy under the federal diversity statute, 28 U.S.C. § 1332. As result of one Justice's recusal, the issue had to be put off for another day. That day has come. The petition for a writ of certiorari should be granted.

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April 21, 2003

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-30857

ROBIN PASSARO LOUQUE, Individually and on behalf of all others similarly situated,

Plaintiff-Appellant,

versus

ALLSTATE INSURANCE COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

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December 13, 2002

Before JOLLY, JONES, and BARKSDALE, Circuit Judges.

EDITH H. JONES, Circuit Judge:

The district court assumed removal jurisdiction and then dismissed the case for failure to state a claim upon which relief can be granted in this putative class action, which challenges Allstate's alleged policy of refusing to settle minor-impact,

softtissue injury actions against its insureds. The principal issue on appeal is whether the amount-in-controversy requirement for diversity jurisdiction was satisfied by the potential recovery of attorney's fees under Louisiana law pertaining to insurance claims handling. We affirm the district court's conclusion that attorney's fees could be recovered under Louisiana law, and that such sum would satisfy the amount-in-controversy requirement. We also affirm the dismissal granted to Allstate on the merits.

BACKGROUND

Allstate insured Robin Louque, the named class representative, under an automobile policy providing $10,000 in liability coverage. Louque alleges that she was in an automobile accident in which another person was injured, she was sued by the victim, and Allstate refused to settle. Judgment was entered against Louque and Allstate for $7569, including $5000 in statutory penalties for violations of LA. REV. STAT. ANN. § 22:1220 (requiring an insurer to "make a reasonable effort to settle claims with the insured or the claimant, or both"). Allstate satisfied the judgment, but apparently successfully appealed the penalty award.

Louque contends that Allstate's policy was to refuse to settle minor-impact, soft-tissue injury (MIST) claims where the claimant was represented by an attorney, regardless of a claim's merit. The resulting delays and judgments adversely affected Allstate policy holders' creditworthiness. Louque pleads that this practice effected a breach of contract, breach of Allstate's fiduciary obligations under the policies, and violation of LA. REV. STAT. ANN. § 22:1220, the provision at issue in the third-party action. LA. REV. STAT. ANN. § 22:658, also at issue in this appeal, is not mentioned in Louque's complaint.

After Allstate removed this action to federal court based on diversity jurisdiction, it moved to dismiss. Louque sought to remand, asserting that the jurisdictional amount was not satisfied. The district court denied remand and held that this action is governed by § 22:658, a provision whose mandatory award of attorney's fees satisfies the jurisdictional amount. Louque v. Allstate Ins. Co., No. 01-CV-1282, at 3-4 (E.D. La. June 21, 2001) (unpublished). Dismissal was granted for failure to state a claim. Id. at 5-8.

DISCUSSION

A. Removal Jurisdiction

The parties spar primarily over whether § 22:658 is applicable, and, if not, whether the requisite amount in controversy for diversity jurisdiction (greater than $75,000) is otherwise satisfied. Diversity of citizenship is not at issue. See 28 U.S.C. § 1332.

This court reviews the denial of remand de novo. Manguno v. Prudential Prop. & Cas. Ins. Co., 276 F.3d 720, 722 (5th Cir. 2002). Louisiana prohibits Louque from stating an ad damnum in her petition. Therefore, Allstate must establish the jurisdictional amount by a preponderance of the evidence. Id. at 723. This is accomplished if "(1) it is apparent from the face of the petition that the claims are likely to exceed $75,000, or, alternatively, (2) the defendant sets forth 'summary judgment type evidence' of facts in controversy that support a finding of the requisite amount." Id. The district court held: "Because Louque intends to represent a nationwide class of 'tens of thousands, if not hundreds of thousands of individuals' and seeks both damages and penalties for each class member, the Court finds that Louque's *attorneys' fees* will easily exceed

the jurisdictional threshold."

Along this line, LA. CODE CIV. PROC. provides:

> The court may allow the *representative parties* their reasonable expenses of litigation, *including attorney's fees*, when as a result of the *class action* a fund s made available, or a recovery or compromise is had which is beneficial, to the class.

Art. 595 (emphasis added). Citing In re Abbott Laboratories, 51 F.3d 524, 526-27 (5th Cir. 1995), aff'd by an equally divided court, 529 U.S. 333 (2000), the district court held that,

> [u]nder . . . article 595, attorneys' fees in a class action lawsuit are wholly allocable to the named plaintiff; and, when article 595 is coupled with a statutory provision mandating an award of attorneys' fees, federal courts will consider that potential award when determining the amount in controversy.

District Court Opinion at 2. See Manguno, 276 F.3d at 723 ("For purposes of determining the amount in controversy in a Louisiana class action, it has been the belief of some courts that . . .article 595 allocates to the class representative the aggregate attorney's fees sought for the entire class *if a separate statute provides for recovery of attorney's fees as an element of damages*.") (citing Abbott Laboratories, supra) (emphasis added).

Recently, our court has clarified that because art. 595 gives a court discretion to award attorney's fees to a class

representative as "expenses of litigation," such fees are includable in a jurisdictional amount determination for diversity purposes regardless of the existence of separate statutory authorization of attorneys fees. Grant v. Chevron Phillips Chem. Co., 2002 U.S. App. LEXIS 21266 (5th Cir. 2002). Unfortunately, this new decision does not assist the resolution of this case, because Allstate did not raise and preserve in the trial court the applicability of art. 595 alone to support an attorney's fee award.[1] We must proceed according to a pre-

---

[1]To preserve such an issue, the "raising party must present so that it places the opposing party and the court on notice that a new issue is being raised." Portis v. First Nat'l Bank of New Albany, Miss., 34 F.3d 325, 331 (5th Cir. 1994). Allstate's removal notice stated, in addition to the possibility that Louque's claims seek recovery under § 22:658, that she "seeks to certify a class action under . . . article 591, *et seq.*, which provides for recovery of attorneys' fees by the named representative." The removal notice then string cited to precedent purportedly holding that the "potential award of attorneys' fees allocated to plaintiff pursuant to Article 595 satisfies the amount in controversy requirement." We assume this stated the art. 595 issue. But, in responding to Louque's remand motion, which briefly referenced art. 595, Allstate did not address whether art. 595 alone could support a fee award. Our court has held that, "'for obvious reasons, [we] will not consider evidence or arguments not presented to the district court *for its consideration in ruling on the motion*.'" Ellison v. Software Spectrum, Inc., 85 F.3d 187, 191 (5th Cir. 1996) (quoting Stults v. Conoco, Inc., 76 F.3d 651, 657 (5th Cir. 1996)) (emphasis added). As a general rule, a party may not allude to an issue in the district court, abandon it at the crucial time when the district court might have been called to rule upon it, and then resurrect the issue on appeal. See, e.g., Hargrave v.

Grant analysis.

In district court, Allstate maintained that Louque's claims are governed by the two earlier-described Louisiana statutes: §§ 22:658 and 22:1220. While both provisions have been held to sustain an attorney's fee award, only § 22:658 mandates such relief. Section 22:658(A) provides in pertinent part:

> (1) All insurers . . . shall pay the amount of *any claim due any insured* within thirty days after receipt of *satisfactory proofs of loss* from the insured or any party in interest.
>
> (2) All insurers . . . shall pay the amount of *any third party property damage claim and of any reasonable medical expenses claim due any bona fide third party claimant within thirty days after written agreement of settlement of* the claim from any third party claimant.

LA. REV. STAT. ANN. § 22:658(A) (emphasis added). Subpart (B)(1) provides:

> Failure to make such *payment* within thirty days after receipt of such satisfactory written proofs and demand therefor, as provided in . . . [§]

Fibreboard Corp., 710 F.2d 1154, 1163-64 (5th Cir. 1983). That Louque herself mentioned the issue, which Allstate then failed to brief, is insufficient to preserve Allstate's error. See Hargrave.

> 22:658(A)(1), or within thirty days after written agreement or settlement as provided in . . . [§] 22:658 (A)(2) when such failure is found to be arbitrary, capricious, or without probable cause, *shall* subject the insurer to a penalty, . . . *together with all reasonable attorney fees* for the prosecution and collection of such loss.

LA. REV. STAT. ANN. § 22:658(B)(1) (emphasis added).

Louque sued under § 22:1220(A), which provides, inter alia:

> An insurer . . . *owes to his insured* a duty of good faith and fair dealing. The insurer has an affirmative duty to adjust claims fairly and promptly and to make a *reasonable effort to settle claims with the insured or the claimant, or both.*

LA. REV. STAT. ANN. § 22:1220(A) (emphasis added). Subpart (C) states that,

> [i]n addition to any general or special damages ... for breach of the imposed duty, the claimant may be awarded penalties assessed against the insurer in an amount not to exceed two times the damages sustained or five thousand dollars, *whichever is greater.*

LA. REV. STAT. ANN. § 22:1220(C) (emphasis added). The award of attorney's fees is not mentioned.

This court, noting the similarity of these provisions, has

permitted the same type of recovery under either one, even where one of the provisions was not expressly cited. In re Hannover Corp. of America, 67 F.3d 70, 75 (5th Cir. 1995). On the basis of Hannover, Allstate maintained, and the district court held, that, even though Louque did not plead § 22:658, it may nevertheless govern her entitlement to attorney's fees. See Reed v. Recard, 744 So. 2d 13, 20 (La. Ct. App. 1998), *writ denied*, 738 So. 2d 572 (La. 1999).

On its face, § 22:658 does not squarely cover a claim by Louque for Allstate's excessive, injurious delay in litigating and paying off a claim after judgment. The statute penalizes instead arbitrary or capricious failures either to pay (1) a claim due the insured "within thirty days after receipt of satisfactory proofs of loss," or (2) a third-party claim "within thirty days after written agreement of settlement." § 22:658(A)(1) and (2). Nevertheless, Louisiana courts have for two decades allowed an award of attorney's fees in cases where an insurer's bad faith refusal to settle led to an excess judgment. See Smith v. Audubon Ins. Co., 656 So. 2d 11, 17 (La. Ct. App. 1995), *rev'd on other grounds*, 679 So. 2d 372 (La. 1996). Smith cited § 22:658 and relied on earlier decisions. See Maryland Casualty Co. v. Dixie Ins. Co., 622 So. 2d 698 (La. App. 1993), writ denied, 629 So. 2d 1138 (La. 1993); Roy v. Glaude, 494 So. 2d 1243 (La. Ct. App. 1986); Fertitta v. Allstate Ins. Co., 439 So. 2d 531 (La. App. 1983), aff'd on other grounds, 462 So. 2d 159 (La. 1995); Domangue v. Henry, 394 So. 2d 638 (La. App. 1980). This court has previously acknowledged that these cases establish Louisiana law. Parich v. State Farm Mut. Auto. Ins. Co., 919 F.2d 906 (5th Cir. 1990), cert. denied sub nom. Judice v. Parich, 499 U.S. 976 (1991).

When Smith reached the Louisiana Supreme Court, one judge criticized, in dissent, the lower court's handling of

attorneys' fees and the caselaw on which the lower court relied. Smith, 679 So. 2d at 378-80 (Calogero, J., dissenting). This is irrelevant. The Louisiana Supreme Court should not have reached this issue, as it decided the case on a dispositive antecedent ground. Moreover, we can hardly accord a solo dissenting opinion any weight as an expression of Louisiana law.

The concurrence suggests that the applicability of § 22:658 is a novel issue as to which an Erie guess is required of this court. Under the present circumstances — in which we are determining whether Louque's petition raised claims over $75,000 for the sole purpose of determining her satisfaction of the federal jurisdictional requirement — we find that course unnecessary to pursue. First, it is plain that Louisiana courts have condoned attorney fee-shifting in certain bad faith insurance claim handling cases for years. Like the district court, we do not think it inappropriate to consider all possible bases for an attorney's fee award to Louque where she pleaded one statutory ground of recovery: Other grounds are readily available in Louisiana; both this court (Hannover, supra) and Louisiana courts (Reed, supra) have recognized overlap in the grounds for recovery; and Louque, as mistress of her complaint, did not disavow her intention to seek a recovery of fees.

Second, it is not for us to second-guess whether Louisiana courts will ultimately find the Smith-Maryland Casualty-Domangue line of cases congruent with, supplemental to, or contradicted by § 658. Those cases presently afford a basis for recovery of attorney's fees by an insured, and we are

Erie-bound to respect their authority.[2]

Third, when determining the amount in controversy for diversity purposes, a federal court need not pre-try the sufficiency of the plaintiff's complaint. Subject matter jurisdiction is not defeated by the possibility that the complaint ultimately fails to state a claim on which Louque could actually recover attorney's fees. As this court has explained,

> there is no inconsistency in the district court's action of denying remand and then dismissing [plaintiff's] claims. . . . "Jurisdiction . . . is not defeated ...by the possibility that the averments might fail to state a cause of action on which [plaintiff] could actually recover."

Hawkins v. Nat. Ass'n of Sec. Dealers, Inc., 149 F.3d 330, 331

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[2]In her brief, Louque criticizes the district court's distinguishing, in its merits determination, cases, like those cited above, against an insurer for bad faith refusal to settle. The district court had observed that those cases required an excess judgment against the insured. Louque then says:

> Appellant respectfully suggests that the facts and damages as alleged by the Appellant are res nova and are no different than an excess judgment situation. In fact, Allstate's actions in these instances could be much more damaging than an excess judgment.

Louque cannot rely on these cases for affirmative recovery while disavowing their applicability to the amount in controversy determination.

(5th Cir. 1998) (quoting Bell v. Hood, 327 U.S. 678, 682 (1946)).

Thus, the question before us is whether the complaint, fairly read, states a claim exceeding $75,000.[3] A successful result for Louque on the merits of her claims that Allstate failed 'to adjust all claims fairly and promptly and to make reasonable efforts to settle' would put her in line to recover class action attorney's fees far exceeding $75,000. The court accordingly had jurisdiction over her claim and, through its exercise of supplemental jurisdiction, over the claims of the class. See 28 U.S.C. § 1367; Abbott Laboratories, supra.

B. Merits

Louque's challenge to the dismissal of her case is perfunctory. In two pages of briefing, she cites — once each — LA. REV. STAT. ANN. §§ 22:658 and 1220, but no caselaw.[4] She argues, without quoting or citing the insurance contract, that her pleadings reference "a policy provision which has been breached by Allstate." She asserts as a conclusion that Allstate breached its fiduciary duty to her. She draws an analogy to the bad-faith refusal-to-settle cases. See n.2, supra. Louque's brief, in short, may not even pass muster under the minimum criteria that we require for a reasoned, record-based presentation of a party's position. 5TH CIR. R. 28.2; see also FED. R. APP. P. 28(a)(9)(A); United States v. Martinez, 263 F.3d 436 (5th Cir. 2001).

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[3]No pertinent jurisdictional amount facts are in dispute.

[4]As Louque did not argue the merits of her claims under §§1220 or 658 on appeal, they are waived. St. Paul Mercury Ins. Co. v. Williamson, 224 F.3d 425, 445 (5th Cir. 2000).

Louque's arguments are, in any event, fully disposed of by the district court's opinion, which we quote:

a. Breach of Contract

> To state a claim for breach of an insurance contract under Louisiana law, a plaintiff must allege a breach of a specific policy provision. See Bergeron v. Pan Am. Assurance Co., 731 So. 2d 1037, 1045 (La. App. 4th Cir. 1999). In the instant case, although Louque claims that Allstate refused to settle "valid" claims, she fails to cite any policy provision that requires Allstate to settle claims before trial. In fact, the only policy provision Louque cites provides that Allstate has unfettered discretion in deciding whether to settle cases:
>
> > We will defend an insured person sued as the result of a covered auto accident, even if the suit is groundless, false or fraudulent. We will choose the counsel. We may settle any claim if we believe it is proper.
>
> Def.'s Ex. A at 5.
>
> In Employers Surplus Line Ins. Co. v. City of Baton Rouge, 362 So. 2d 561, 564 (La. 1978), the Louisiana Supreme Court construed a similar policy provision. The Employers policy provided that the insurance company was authorized to "make such investigation, negotiation and settlement of any claim or suit it deems expedient." Id. at 565. The Louisiana Supreme Court explained that:
>
> This provision vests the insurer with absolute

> authority to settle claims within the limits of the policy with the insured's having no power to compel the insurer to make settlements or prevent it from doing so.

Id. As in Employers Surplus, Allstate is given absolute discretion over whether or not to settle a claim. Because Allstate's policy does not obligate it to settle any claim before trial, the Court finds that Louque fails to state a claim for breach of contract.

b. Breach of Fiduciary Obligation

Louque also alleges that Allstate breached a fiduciary obligation by failing to settle "valid claims" before trial. However, as stated above, Allstate was not contractually bound to settle Louque's claim; and Louisiana law does not recognize an extracontractual obligation where there is no risk of exposing the insured to excess liability. See, e.g., Ragas v. MGA Ins. Co., 1997 WL 79357, at *2 (E.D.La. Feb. 21, 1997) (McNamara, J.) (holding that an insured has no cause of action against its insurer for bad faith refusal to settle in the absence of an adjudicated excess judgment against the insured). In the case at bar, Louque has neither an "adjudicated excess judgment" nor even any claim that Allstate's decision to go to trial exposed her to excess liability. To the contrary, Louque avers that prior to trial the "third party was claiming damages well below the $10,000 policy limits of [Louque's] policy." Compl. at ¶ 5. Because Louque does not allege that Allstate's alleged refusal to settle exposed her to excess liability, the Court finds that she has failed to state a cause of action for breach of fiduciary obligation.

For these reasons, Louque's complaint against Allstate failed to state a claim upon which relief can be granted. FED. R. CIV. PROC. 12(b)(6).

CONCLUSION

The district court correctly assumed removal jurisdiction and correctly entered judgment dismissing Louque's complaint.

AFFIRMED.

RHESA HAWKINS BARKSDALE, Circuit Judge, specially concurring:

I concur in the majority's holding: (1) Allstate did not preserve in district court the applicability of article 595 (therefore, our recent ***Grant*** decision is not applicable); and (2) pursuant to Rule 12(b)(6), Louque failed to state a claim upon which relief can be granted.

I have some misgivings, however, concerning whether the diversity jurisdictional amount is satisfied. Therefore, I concur *dubitante* in holding § 22:658 applicable. (In my view, the applicability *vel non* of § 22:658 in its present form (amended in 1989) has not been decided by Louisiana courts; an ***Erie***-analysis is required. In any event, in the light of ***Grant***'s holding concerning article 595, it may well be that this § 22:658 issue will seldom, if ever, surface again.)

United States District Court, E.D. Louisiana.

Robin Passaro LOUQUE, et al
v.
ALLSTATE INSURANCE COMPANY

No. Civ.A. 01-1282.

June 27, 2001.

ORDER AND REASONS

Before the Court are plaintiff Robin Passaro Louque's Motion to Remand and defendant Allstate Insurance Company's Motion to Dismiss Plaintiff's Class Action Complaint. For the following reasons the plaintiff's motion is DENIED, and the defendant's motion is GRANTED.

A. Background

Defendant Allstate Insurance Company ("Allstate") insured plaintiff Robin Passaro Louque ("Louque") under a Louisiana Automobile Indemnity Policy providing liability coverage for up to $10,000. In July 1995, Louque was involved in a two car accident in which a third party was injured. The injured party filed suit against Louque, and Allstate allegedly refused to settle the case because the third party incurred only "minor impact, soft tissue" or "MIST" injuries and because the third party was represented by an attorney. Compl. at ¶ 5.

In the instant suit, Louque contends that Allstate follows a policy of refusing to settle attorney-represented MIST cases and claims that the policy has "negatively impacted" her credit

rating. Compl. ¶ 9. In particular, she argues that she and other Allstate policy holders were "denied credit, and/or [were] offered less credit, and/or [were] offered credit at a higher interest rate" because of the judgments entered against them when Allstate insisted on taking their cases to trial. Compl. ¶ 10. In her class action complaint, Louque accuses Allstate of breaching its insurance contracts, breaching its fiduciary obligations to policy holders, and violating La.Rev.Stat. § 22:1220 by arbitrarily refusing to settle claims under the MIST policy.

Allstate removed the case to this Court on April 30, 2001. Louque now asks the Court to remand the case, and Allstate asks the Court to dismiss Louque's claims.

B. Law and Analysis

1. Plaintiff's Motion to Remand

A civil action can be removed from state court if the federal courts have original subject matter jurisdiction. *See* 28 U.S.C. § 1441(a). In a class action, diversity jurisdiction exists if the named parties are diverse and the amount in controversy for the named plaintiff's claim exceeds $75,000. In the case at bar, it is undisputed that diversity of citizenship exists. Louque submits that the Court lacks jurisdiction because the requisite amount in controversy has not been met.

Under Louisiana Code of Civil Procedure article 595, attorneys' fees in a class action lawsuit are wholly allocable to the named plaintiff; and, when article 595 is coupled with a statutory provision mandating an award of attorneys' fees, federal courts will consider that potential award when determining the amount in controversy. *See* In re Abbott Labs.,

51 F.3d 524, 526-27 (5th Cir.1995).

In the case at bar, Allstate argues that Louque's claims are governed by two different Louisiana statutes, one of which authorizes an award of attorneys' fees. Section 22:1220 of the Louisiana Revised Statutes subjects an insurer to penalties if it arbitrarily fails to pay a claim within sixty days following satisfactory proof of loss. La.Rev.Stat. Ann. § § 22:1220(A), (B)(5), (C) (West 1995). Similarly, Section 22:658 awards penalties and attorneys' fees if an insurer fails to pay a claim within thirty days of satisfactory proof of loss and the failure is found to be arbitrary, capricious, or without probable cause. La.Rev.Stat. Ann. § § 22:658(A)(1), (B)(1) (West 1995).

Although Louque contends that she is entitled to recovery under section 1220 for Allstate's failure to promptly settle her claim, she submits that section 658 forms no part of her lawsuit. However, in Hannover Corp. of America v. State Farm Mut. Auto Ins. Co., 67 F.3d 70, 75 (5th Cir.1995), the Fifth Circuit noted that sections 658 and 1220 "are similar in that each statute provides for penalty awards when an insurer has arbitrarily, capriciously, or without probable cause failed to timely settle a claim." The Hannover court further held that, although the plaintiff included only one statute in the complaint, both statutes applied to the plaintiff's cause of action.

In the instant case, Louque alleges that she suffered damages because Allstate failed "to adjust all claims fairly and promptly and to make reasonable efforts to settle [the MIST] claims with the claimants" and prays for "all just and equitable relief." Pet. at ¶ 20. In light of these allegations and the Fifth Circuit's holding in Hannover, the Court finds that Louque is entitled to relief under both sections 658 and 1220.

Accordingly, attorneys' fees are available.

Louque further argues that she will waive her statutory right to attorneys' fees under section 658. However, she does not have the authority to do so. *See* DeAguilar v. Boeing, 47 F.3d 1404, 1413 (5th Cir.1995) (holding that representative plaintiffs did not have the authority to limit the amount of damages recoverable by the class members); Pendleton v. Parke-Davis, 2000 WL 1808500,*5 (E.D.La. Dec. 7, 2000) (Porteous, J.) (rejecting "waiver" of attorney fees awardable under Louisiana's redhibition statutes); Manguno v. Prudential Prop. and Cas. Ins. Co., No. 99-903-C-1, slip op. at 9-10 (M.D.La. Sept. 7, 2000) (holding that a class representative's waiver of attorneys' fees was "disingenuous"). Accordingly, the Court finds that attorneys' fees may be taken into account in determining whether Louque's claims exceed $75,000.

Because Louque intends to represent a nationwide class of "tens of thousands, if not hundreds of thousands of individuals" and seeks both damages and penalties for each class member, the Court finds that Louque's attorneys' fees will easily exceed the jurisdictional threshold. Accordingly, Louque's Motion to Remand is DENIED.

Furthermore, in accordance with the Fifth Circuit's holding in Abbott Laboratories,[5] the Court will exercise

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[5]In a similar class action scenario, the Abbott court held that the district court should have exercised supplemental jurisdiction over the entire class because:

> The district court has diversity jurisdiction over the named plaintiffs' claims; § 1367 granted it

supplemental jurisdiction over the claims of the remaining putative class members under 28 U.S.C. § 1367.

2. Defendant's Motion to Dismiss

In a motion to dismiss for failure to state a claim upon which relief may be granted, the Court must accept all well-pleaded facts as true and view the facts in the light most favorable to the plaintiffs. *See* Campbell v. City of San Antonio, 43 F.3d 973, 975 (5th Cir.1995). Dismissal is warranted if "it appears certain that the plaintiff[s] cannot prove any set of facts in support of [their] claim that would entitle [them] to relief." Piotrowski v. City of Houston, 51 F.3d 512, 514 (5th Cir.1995) (quoting Leffall v. Dallas Indep. Sch. Dist., 28 F.3d 521, 524 (5th Cir.1994)). In the case at bar, Allstate moves the Court to dismiss Louque's allegations that it breached its contractual and fiduciary obligations and violated section 22:1220 by refusing to settle attorney-represented MIST claims.

a. Breach of Contract

To state a claim for breach of an insurance contract under Louisiana law, a plaintiff must allege a breach of a

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> supplemental jurisdiction over the claims of the unnamed plaintiffs; and, considering that it must try the named plaintiffs' claims, it abused its discretion on the facts here in declining supplemental jurisdiction over the unnamed plaintiffs' claims.

Abbott Labs., 51 F.3d at 530.

specific policy provision. *See* Bergeron v. Pan Am. Assurance Co., 731 So.2d 1037, 1045 (La.App. 4th Cir.1999). In the instant case, although Louque claims that Allstate refused to settle "valid" claims, she fails to cite any policy provision that requires Allstate to settle claims before trial. In fact, the only policy provision Louque cites provides that Allstate has unfettered discretion in deciding whether to settle cases:

> We will defend an insured person sued as the result of a covered auto accident, even if the suit is groundless, false or fraudulent. We will choose the counsel. We may settle any claim if we believe it is proper.

Def.'s Ex. A at 5.

In Employers Surplus Line Ins. Co. v. City of Baton Rouge, 362 So.2d 561, 564 (La.1978), the Louisiana Supreme Court construed a similar policy provision. The Employers policy provided that the insurance company was authorized to "make such investigation, negotiation and settlement of any claim or suit it deems expedient." Id. at 565. The Louisiana Supreme Court explained that:

> This provision vests the insurer with absolute authority to settle claims within the limits of the policy with the insured's having no power to compel the insurer to make settlements or prevent it from doing so.

Id. As in Employers Surplus, Allstate is given absolute discretion over whether or not to settle a claim. Because Allstate's policy does not obligate it to settle any claim before trial, the Court finds that Louque fails to state a claim for

breach of contract.

b. Breach of Fiduciary Obligation

Louque also alleges that Allstate breached a fiduciary obligation by failing to settle "valid claims" before trial. However, as stated above, Allstate was not contractually bound to settle Louque's claim; and Louisiana law does not recognize an extracontractual obligation where there is no risk of exposing the insured to excess liability. *See, e.g.,* Ragas v. MGA Ins. Co., 1997 WL 79357, at *2 (E.D.La. Feb. 21, 1997) (McNamara, J .) (holding that an insured has no cause of action against its insurer for bad faith refusal to settle in the absence of an adjudicated excess judgment against the insured). In the case at bar, Louque has neither an "adjudicated excess judgment" nor even any claim that Allstate's decision to go to trial exposed her to excess liability. To the contrary, Louque avers that prior to trial the "third party was claiming damages well below the $10,000 policy limits of [Louque's] policy." Compl. at ¶ 5. Because Louque does not allege that Allstate's alleged refusal to settle exposed her to excess liability, the Court finds that she has failed to state a cause of action for breach of fiduciary obligation.

3. La.Rev.Stat. § 22:1220

Finally, Louque contends that Allstate violated section 22:1220 by arbitrarily refusing to settle her claim. In Theriot v. Midland Risk Ins. Co., 694 So.2d 184, 188 (La.1997), the Louisiana Supreme Court determined that the specific prohibited acts enumerated in La.Rev.Stat. § 22:1220(B) comprise "an exclusive list of the types of conduct for which damages and penalties can be sought by insureds and third-party claimants pursuant to the statute ." Although Louque did

not allege any violations of Subsection B in her complaint, in her opposition to Allstate's motion to dismiss she raises for the first time the claim that Allstate "[m]isrepresent[ed] pertinent facts or insurance policy provisions." La.Rev.Stat. § 22:1220(B)(1). Specifically, Louque argues that Allstate's policy provision that it "may settle any claim if we believe it is proper" is untrue, because Allstate allegedly would not settle a MIST claim even if it did believe settlement were proper.

However, Louisiana courts have held that claims under § 1220(B)(1) are limited to those involving "facts about the policy itself, such as the amount of coverage, lapse or expiration of the policy, or exclusions from coverage." Strong v. Farm Bureau Ins. Co., 743 So.2d 949, 953 (La.App. 2nd Cir.1999). None of those issues are implicated by Allstate's alleged conduct in the present case. In addition, the Court has already explained that the policy provision which allows Allstate to settle cases does not obligate it to do so. Despite Louque's belated attempt to use her opposition to plead facts sufficient to state a claim under section 1220(B), the Court finds that she fails to state a claim because Allstate cannot be held liable for conduct not specifically prescribed by the statute.

Because the Court finds that Louque has failed to state a claim for breach of contract, breach of fiduciary duty, or violations of section 1220, Allstate's motion to dismiss is GRANTED.

C. Conclusion

For the reasons stated above, IT IS ORDERED that

(1) plaintiff Robin Passaro Louque's Motion to

Remand is DENIED and

(2) defendant Allstate Insurance Company's Motion to Dismiss is GRANTED.

New Orleans, Louisiana, this 27 day of June, 2001.

s/ Edith Brown Clement
EDITH BROWN CLEMENT, CHIEF JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-30857

ROBIN PASSARO LOUQUE, Individually and on behalf of all others similarly situated,

Plaintiff-Appellant

v. [Filed Jan 24 2003]

ALLSTATE INSURANCE COMPANY

Defendant-Appellee

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans

ON PETITION FOR REHEARING

Before JOLLY, JONES, and BARKSDALE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

s/ Edith H. Jones
United States Circuit Judge

Supreme Court, U.S.
FILED
JUN 6 2003
OFFICE OF THE CLERK

No. 02-1540

IN THE

Supreme Court of the United States

ROBIN PASSARO LOUQUE, Individually and on Behalf of All Others Similarly Situated,

Petitioners,

v.

ALLSTATE INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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RESPONDENT'S STATEMENT OF QUESTIONS PRESENTED

1. Where the named plaintiff in a nationwide class action does not challenge the court's exercise of original jurisdiction over her claims under the court's diversity jurisdiction or the court's dismissal of her claims pursuant to Federal Rule of Civil Procedure 12(b)(6), may the named plaintiff challenge the court's exercise of supplemental jurisdiction over the claims of the absent putative members of an uncertified class before this Court?

2. Does the supplemental jurisdiction statute, 28 U.S.C. § 1367, authorize a federal court to exercise supplemental jurisdiction over the claims of absent putative class members in a nationwide class action where the federal court has original jurisdiction over the named plaintiff's claims under the federal court's diversity jurisdiction?

STATEMENT PURSUANT TO RULE 29.6

Respondent Allstate Insurance Company is a wholly-owned subsidiary of The Allstate Corporation, which is a Delaware corporation. The stock of The Allstate Corporation is publicly traded. No publicly-held entity owns 10% or more of the stock of The Allstate Corporation.

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COUNTER-STATEMENT OF THE CASE

Petitioner's claims were dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) (Pet. App. at 24a), and that dismissal was upheld after what the Fifth Circuit characterized as a "perfunctory challenge". Pet. App. at 11a. Petitioner does not challenge the dismissal of or exercise of original jurisdiction over *her* claims. Yet she asks this Court to review an issue not raised below, the Court's exercise of supplemental jurisdiction over the absent class members' claims, to resolve a conflict among the circuits.[1] Although a circuit conflict exists, this case is not the proper vehicle for the resolution because the petitioner's claims were dismissed and she now lacks standing to pursue the absent class members' claims. In addition, the issue presented was not disputed in the courts below.

This nationwide class action arises from the actions of Respondent, Allstate Insurance Company ("Allstate"), in defending its insured, petitioner Robin Passaro Louque ("Louque"), against a liability claim. In that suit, Allstate did not settle the claim before trial, the claimant obtained a judgment against Louque well within Louque's policy limits, and Allstate promptly paid the judgment without exposing Louque to personal liability. Louque nevertheless sued Allstate in Louisiana state court individually and on behalf of all Allstate policyholders nationwide and in Puerto Rico and the Virgin Islands for failing to settle the cases before trial. Louque asserted claims for breach of contract, breach of fiduciary duty, and violation of a "bad faith" statute found in the Louisiana Insurance Code.

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1. Last term, petitioner's counsel opposed a Petition For Writ Of Certiorari seeking resolution of the same issue. *Daimler Chrysler Corp. v. Gibson*, No. 01-688. Respondent's Brief In Opposition.

Allstate removed the case to federal district court, on the ground that the federal court had original jurisdiction over Louque's claims based on diversity of citizenship pursuant to 28 U.S.C. § 1332(a)(1), and supplemental jurisdiction over the absent class members' claims pursuant to 28 U.S.C. § 1367 and *In re Abbott Laboratories*, 51 F.3d 524 (5th Cir.), *reh'g and suggestion for reh'g en banc denied*, 65 F.3d 33 (5th Cir. 1995). The district court thereafter granted Allstate's Motion to Dismiss the Complaint. The court held that under the Allstate insurance policy at issue, Allstate had "unfettered discretion" to decide whether or not to settle a claim, and therefore Louque failed to state a claim for breach of contract or breach of fiduciary duty. The court further found that Louque failed to state a claim under the Louisiana bad faith statute, Louisiana Revised Statute 22:1220, because the alleged wrongful act of "arbitrarily refusing to settle her claim" is not conduct "specifically prescribed by the statute."

The district court also determined that it had subject matter jurisdiction. Consistent with *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356 (1921), *overruled on other grounds sub nom Tracey v. New York Life Ins. Co.*, 314 U.S. 118 (1941), the district court looked to the named plaintiff and not the absent class members to determine original jurisdiction. Attributing to Louque the attorneys' fees that may be awarded, as permitted by Louisiana Code of Civil Procedure article 595 and *Abbott Labs*,[2] the court concluded

2. In *Grant v. Chevron Phillips*, 309 F.3d 864 (5th Cir. 2002), *cert. denied*, 123 S. Ct. 1634 (2003), the Fifth Circuit revisited *Abbott Labs* and reaffirmed that under Louisiana Code of Civil Procedure article 595, where a fee shifting statute is implicated in a class action, all attorney fees shall be aggregated and attributed to the named

(Cont'd)

that because Louque "intends to represent a nationwide class of 'tens of thousands, if not hundreds of thousands of individuals' and seeks both damages and penalties for each class member," "Louque's attorneys' fees will easily exceed the jurisdictional threshold," thereby establishing original jurisdiction over Louque's claim. Following *Abbott Labs*, the court exercised supplemental jurisdiction over the absent class members' claims under Section 1367, *without objection from Louque.*

The Fifth Circuit affirmed in all respects. Noting that "Louque's challenge to the dismissal of her case is perfunctory," and "may not even pass muster under the minimum criteria that was required for a reasoned, record-based presentation of a party's position," (Pet. App. at 11a) the appellate court agreed with the district court's conclusion that Louque failed to state a claim for breach of contract and breach of fiduciary duty. Pet. App. at 12a-13a. The court further found "as Louque did not argue the merits of her bad faith claims on appeal, they are waived." *Id.* at 11a. The Fifth Circuit also agreed that the district court had original jurisdiction over Louque's claim, and "through its exercise of supplemental jurisdiction, jurisdiction over the claim of the class," citing Section 1367 and *Abbott Labs. Louque did not argue on appeal that the exercise of supplemental jurisdiction was improper under Section 1367.*

Louque does not challenge here the court's dismissal of or exercise of original jurisdiction over her claims.

(Cont'd)
plaintiff. The court then held that even in the absence of a fee shifting provision, pursuant to Louisiana Code of Civil Procedure article 595, attorney fees are attributable to the class representatives for purposes of calculation of the amount in controversy.

She challenges only the exercise of supplemental jurisdiction under Section 1367 over the claims of the putative class, an issue not argued below.

REASONS TO DENY THE PETITION

1. Louque Lacks Standing To Pursue The Absent Class Members' Claims.

The Fifth Circuit affirmed dismissal of Louque's claims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. As found by the Fifth Circuit, Louque failed to state a claim for breach of contract or breach of fiduciary duty because the policy gives Allstate "unfettered discretion in deciding whether to settle cases" and "Louque waived her claims under [the Louisiana Insurance Code] on appeal, by not arguing the merits." Pet. App. at 11a-12a. In so ruling, the Fifth Circuit noted that "Louque's challenge to the dismissal of her case is perfunctory;" cites no case law, and "may not even pass muster under the minimum criteria that we require for a reasoned, record-based presentation of a party's position." *Id.* at 11a.

Louque does not dispute here that the federal court had original jurisdiction over her individual claims and does not complain about dismissal of those claims. Accordingly, the judgment dismissing her claims is now final. Since Louque no longer can sue in her own right, she is not eligible to pursue claims for the class. This Court has long recognized that a plaintiff must have a live controversy to be eligible to pursue claims on behalf of an uncertified class.

> There must not only be a named plaintiff who has such a case or controversy at the time the

> complaint is filed, and at the time the class action is certified by the District Court pursuant to Rule 23, but there must be a live controversy at the time [the Supreme Court] reviews the case.

Sosna v. Iowa, 419 U.S. 393, 402 (1975). *See, e.g., Board of School Comm'rs v. Jacobs*, 420 U.S. 128 (1975) (finding moot a case where named plaintiffs no longer had a claim and class was not certified). The circuit courts are in step, consistently holding that a class representative without live claims cannot represent an uncertified class. *Lusardi v. Xerox Corp.*, 975 F.2d 964 (3d Cir. 1992) (named plaintiff can appeal adverse decision on certification only if at the time the certification decision was rendered the plaintiff had a live claim); *Rocky v. King*, 900 F.2d 864, 866 (5th Cir. 1990) (controversy posed by plaintiff's complaint must be live throughout litigation process); *Kauffman v. Dreyfus Fund, Inc.*, 434 F.2d 727, 734 (3d Cir. 1970). ("[A] predicate to [a plaintiff's] right to represent a class is his eligibility to sue in his own right. What he may not achieve himself, he may not accomplish as a representative of a class."), *cert. denied*, 401 U.S. 974 (1971).

Here, prior to certification Louque's claims were dismissed pursuant to Rule 12(b)(6). And, Louque does not contest that dismissal. Since Louque no longer can sue in her own right, she may no longer pursue claims on behalf of the class. Accordingly, Louque lacks standing to pursue the absent class members' claims.

2. This Case Is A Procedurally Inappropriate Vehicle For Considering Whether § 1367 Overrules *Zahn*.

The circuits undoubtedly are split regarding whether 28 U.S.C. § 1367 partially overrules *Zahn v. International Paper Company*, 414 U.S. 291 (1973) and provides supplemental jurisdiction in diversity cases over claims of absent class members whose claims may not satisfy the amount in controversy requirement. But this case is a procedurally inappropriate vehicle for resolving the conflict.

Louque did not contest that the district court had jurisdiction under Section 1367 over the absent putative class members' claims in either the district court or the Fifth Circuit. The issue neither was briefed nor argued in the courts below and only is summarily referred to in passing in the Fifth Circuit's decision. This Court, thus, is being asked to consider an issue not litigated below.

And, the request is made by a party whose claims were dismissed on the pleadings after she mounted a "perfunctory challenge" to the district court's dismissal of two claims and abandoned another on appeal.[3] As a result, even if Louque were to prevail on the *Zahn* issue, her claims are not revived. Rather, the result would be a "headless" class action suit that is remanded to proceed without a class representative.

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3. Louque's failure to launch even a meager defense against dismissal of her claims on the merits is tantamount to a concession as to the groundless nature of her claims. If Louque did not believe her claims were worthy of more than a perfunctory defense, then surely the case is not worthy of review by this Court.

3. The Fifth Circuit Correctly Held That The District Court May Exercise Supplemental Jurisdiction Over The Absent Class Members' Claims.

Louque does not challenge that the federal court had original jurisdiction over her claims under 28 U.S.C. § 1332. Instead, and for the first time, she contends that the federal court should not have exercised supplemental jurisdiction over the absent class members' claims. Although the issue has never been briefed or argued in this case, Louque asks this Court to review the issue to resolve a circuit conflict.[4]

Louque's argument should be rejected because the lower courts' decisions are correct. As held by the Fifth Circuit below as well as the Fourth, Seventh and Ninth Circuits, the plain meaning of the text of Section 1367 permits a court to exercise supplemental jurisdiction over absent class members' claims even when those claims do not all meet the amount in controversy requirement. *Rosmer v. Pfizer, Inc.*,

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4. Despite the circuit conflict, this Court refused in this term and last to consider the same jurisdictional issue in cases that had not been dismissed or were more worthy of review. In each instance, this Court denied certiorari. In *Grant v. Chevron Phillips Chemical Company*, 309 F. 3d 864 (5th Cir. 2002), *cert. denied*, 123 S. Ct. 1634 (2003), for example, defendants removed to federal court from a Louisiana state court a class action involving only Louisiana class members and Louisiana state law claims. Like here, the district court in *Grant* exercised supplemental jurisdiction over the absent class members' claims. Although the issue was present, this Court denied certiorari. Similarly, last term the Court considered *Gibson v. Chrysler Corp.*, 261 F.3d 927 (9th Cir. 2001), where the Ninth Circuit held that Section 1367 allows a federal court to exercise supplemental jurisdiction over absent class members' claims and overrules *Zahn* and the issue was raised in the Petition For Writ Of Certiorari. The Court nevertheless denied certiorari. 534 U.S. 1104.

263 F.3d 110 (4th Cir. 2001) (Section 1367 confers federal jurisdiction over absent class members whose claims do not satisfy the jurisdictional amount), *cert. dismissed*, 536 U.S. 979 (2002); *Gibson v. Chrysler Corp.*, 261 F.3d 927 (9th Cir. 2001) (Section 1367 allows the court to exercise supplemental jurisdiction over absent class members' claims), *cert. denied*, 534 U.S. 1104 (2002); *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599 (7th Cir. 1997) (court may exercise supplemental jurisdiction). Those courts correctly construed the plain text of Section 1367. Section 1367 provides:

> (a) Except as provided in subsection [ ](b) . . . , in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.
>
> (b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule

> 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

The first subsection broadly authorizes federal courts, in any civil action of which they have original jurisdiction to exercise supplemental jurisdiction "over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III." *Id.* Pursuant to subsection (a), so long as there is a claim within a district court's original jurisdiction, the court has supplemental jurisdiction "over all other claims" that are transactionally related.

The second subsection carves out specific exceptions to the broad grant of supplemental jurisdiction authority in diversity cases but Rule 23 is absent from the list of specific exceptions. Because the putative class members' claims fall within the first subsection but are not carved out by the second subsection, the Fifth Circuit properly concluded that the class claims fell within the statutory scope of supplemental jurisdiction.

Louque, however, insists that class actions do not involve assertions of supplemental jurisdiction and, therefore, Section 1367 does not apply. (Pet. App. at 10). According to Louque, before supplemental jurisdiction can be exercised, the court must have "original jurisdiction" over the *entire* civil action, that is, over the claims of the named plaintiff and all absent class members.[5] This argument ignores the statutory

5. For Louque's argument to be correct, the term "original jurisdiction" in subsection (a) necessarily will mean something different in diversity and federal question jurisdiction. This Court (Cont'd)

language and renders supplemental jurisdiction superfluous. "The whole point of supplemental jurisdiction is to allow the district courts to exercise pendent jurisdiction over claims as to which original jurisdiction is lacking." *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 167 (1997). If the statute required original jurisdiction over all claims in the "civil action," then, by definition, there would be no "other claims" over which to exercise supplemental jurisdiction.

Not only is Louque's argument at war with the statute's plain language, it also conflicts with this Court's precedent. Louque's argument that the court must have original jurisdiction over the absent class members' claims was rejected long ago by this Court in *Supreme Tribe of Ben Hur*, 255 U.S. 356 at 366. There, the Court held that the requirement of complete diversity of citizenship in class actions is assessed solely by reference to the citizenship of the named plaintiffs, not the absent class members. Thus, since 1921, this Court has recognized that original jurisdiction does not have to exist over the claims of both the named plaintiff and all absent class members.

If diversity of citizenship is not required for each absent class member, logic dictates that each absent class member likewise is not required to satisfy the other prong of original jurisdiction, the amount in controversy.[6] The district court

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has long held that in a federal question case, there need not be subject matter jurisdiction over all the claims in the complaint for there to be "original jurisdiction" within the meaning of subsection (a). *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966) (where Court has subject matter jurisdiction over federal claim, court may exercise pendent jurisdiction over state law claim).

6. Practical considerations support this result. If each absent class member's claim had to satisfy the amount in controversy

(Cont'd)

and Fifth Circuit decisions here merely treat the prongs of original jurisdiction symmetrically.

Recognizing that a federal court may exercise supplemental jurisdiction over absent class members' claims also is "conducive to the administration of justice."[7] This Court recently held another subsection of Section 1367 constitutional because, *inter alia*, "[i]t eliminates a serious impediment to access to the federal courts on the part of plaintiffs pursuing federal and state law claims, that (derive from a common nucleus of operative facts)," and therefore is "conducive to the administration of justice." *Jinks v. Richland County, S.C.*, 123 S. Ct. 1667, 1671 (2003) (discussing Section 1367(d)). Construing Section 1367 to allow the exercise of supplemental jurisdiction over absent class members likewise is "conducive to the administration of justice" because it allows parties to pursue in federal courts all claims arising out of a common nucleus of operative facts.

(Cont'd)
requirement, then defendants would be entitled to jurisdictional discovery from absent class members, a result at odds with traditional discovery rules.

7. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 414-15 (1819).

CONCLUSION

Louque's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

ROBIN PASSARO LOUQUE, Individually and on Behalf of All Others Similarly Situated,

Petitioners,

v.

ALLSTATE INSURANCE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITIONERS' REPLY BRIEF

Respondent's opposition explicitly acknowledges the circuit split and does not contest that the question presented is important and worthy of review. It argues only that petitioner Louque lacks standing and that this case is not a proper vehicle to decide whether 28 U.S.C. § 1367 overruled this Court's decision in *Zahn*. Neither contention is correct.

I. Respondent's Standing Argument Is Meritless.

Respondent argues that petitioner Louque lacks standing. Respondent asserts that Louque does not dispute that "the federal court had original jurisdiction over her individual claims," and concludes therefore that because "the judgment dismissing her claims is now final," "she is not eligible to pursue claims for the class." Opp. 4. Both respondent's premise and conclusion are wrong.

Petitioners' fundamental submission to this Court is that the federal court did *not* have "original jurisdiction" over Louque's claims, because, in a class action, "original jurisdiction" only exists when both the named plaintiffs *and* the absent class members individually have the requisite amount in controversy. *See* Petition 10-11. The dismissal of petitioners' claims on the merits is irrelevant to the question whether Louque has suffered injury and thus has standing to seek relief from this Court. If this Court holds that *Zahn* remains good law, there was no basis for the district court to have exercised jurisdiction over her or any other class member and thus no basis for finding that Louque had the requisite amount in controversy, which was premised entirely on attributing all of the absent class members' claims for attorney's fees to the named plaintiff Louque. The district court would then have been without diversity jurisdiction under 28 U.S.C. § 1332, and it would have been required to remand the case to the Louisiana

state court from which it was improperly removed.

Respondent's view of standing makes no sense. Under it, the court of appeals' affirmance of the dismissal on the merits would insulate its jurisdictional ruling from review in this Court even if that dismissal was issued by a court that never had subject matter jurisdiction — in direct contravention of this Court's admonition that federal courts must assure themselves of their own jurisdiction before ruling on the merits. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1997).[1]

Respondent fails to mention that *In re Abbott Laboratories*, 51 F.3d 524 (5th Cir. 1995) ("*Abbott Labs*"), *aff'd by an equally divided court sub nom. Free v. Abbott Laboratories*, 529 U.S. 333 (2000), was in exactly the same procedural posture as is this case. There, when this Court granted review, the class had not been certified, and the Fifth Circuit had ruled that (1) the named plaintiffs had the requisite amount in controversy because of class action attorney's fees arising from the absent class members' claims; (2) the district court properly exercised jurisdiction under section 1367, even though the absent class members did not individually have the requisite amount in controversy; and (3) the state-law claims had been properly dismissed on the merits. *See Abbott Labs*, 51

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[1]Respondent's standing argument appears to give great weight to the fact that petitioners do not contest the dismissal on the merits *in this Court*. Opp. 5 ("Louque does not contest that dismissal" in the petition); *see also* Opp. 3 ("Louque does not challenge here the court's dismissal of ... her claims"). However, petitioners could not have challenged the Rule 12(b)(6) dismissal before this Court because that dismissal involved solely issues of Louisiana law, which this Court does review on certiorari.

F.3d at 526-29; *Free v. Abbott Laboratories, Inc.*, 176 F.3d 298 (5th Cir. 1999). On review before this Court, the parties in *Abbott Labs* understood that jurisdiction was logically the first question in the case, and thus the dismissal on the merits did not defeat the plaintiffs' standing to challenge the Fifth Circuit's holding on the supplemental jurisdiction question.

Respondent's standing argument fails for an additional reason. The opposition addresses only *petitioner Louque's* standing; however, the petition was filed on behalf of Louque *and the class that she represents*. Although the class action was never certified, the lower courts' assertion of supplemental jurisdiction over the class members injured them because it deprived them of the right to present their class action suit to the state court in which it was filed. To be sure, after the Fifth Circuit's ruling below, the absent class members are free, in theory, to file another class action in Louisiana state court headed by a named plaintiff other than Louque. However, if they were to do so, respondent would again remove on the basis of the Fifth Circuit's ruling in *Abbott Labs,* and the case would again be dismissed on the basis of the Fifth Circuit's ruling below. The class members' injury — deprivation of the right to maintain their small claims class action in state court — would be remedied by a ruling of this Court that *Zahn* was not overruled by 28 U.S.C. § 1367, and the class members have standing for this reason as well.

II. Contrary To Respondent's Assertions, This Case Presents An Ideal Vehicle To Decide The Issue That This Court Was Unable To Resolve In *Abbott Labs.*

Respondent acknowledges the circuit split, but maintains that this case is a "procedurally inappropriate vehicle" for deciding the question that this Court considered

(but was unable to resolve) in *Abbott Labs*. Opp. 6. Respondent is incorrect.

Respondent argues first that the Court should deny review because the *Zahn* issue was not litigated below. In both the district court and the court of appeals, petitioners argued that the district court lacked diversity jurisdiction over both Louque and the unnamed class members because relevant Louisiana law did not permit attribution of class action attorney's fees to petitioner Louque. The parties did not specifically address the issue of *Zahn*'s continued vitality in their court of appeals' briefs for an obvious reason: That issue has been settled law in the Fifth Circuit since 1995, when that court held that section 1367 overruled *Zahn*, *Abbott Labs*, 51 F.3d 524, and denied rehearing en banc without a single vote to the contrary. 65 F.3d 33 (5th Cir. 1995). Thus, respondent's lament that the *Zahn* issue was neither "briefed nor argued in the courts below" (Opp. 6) rings hollow: The decisions in those courts were preordained and full briefing would have served no conceivable purpose. More importantly, respondent does not explain why some other case would be a better vehicle to resolve the deep and intractable conflict in the circuits.[2]

Moreover, even if there were a plausible argument that petitioners failed to preserve the *Zahn* question, that would not matter in this case, because the question presented goes to the district court's subject matter jurisdiction. This Court has said

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[2]Respondent's statement that the *Zahn* issue was "only summarily referred to" in the decision below (Opp. 6) underscores our point: The issue was dealt with summarily because it is settled law in the Fifth Circuit.

time and again that both it and the lower federal courts are obligated to raise jurisdictional issues on their own, even when the parties do not. *See, e.g., Steel Co.*, 523 U.S. at 94-96; *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986). That being the case, the Court can and should entertain a petition that *does* raise a question of subject matter jurisdiction, even where it was not argued below. That conclusion follows *a fortiori* from *Nguyen v. United States*, __ S. Ct. __, 2003 WL 21310207 (June 9, 2003). There, the Court granted certiorari in two cases presenting the question whether a judgment in a federal criminal appeal is valid if one of the members of the appellate panel is not an Article III judge, even though neither petitioner raised that issue until filing his petition for a writ of certiorari. *Id.* at *3.

Finally, respondent argues that the Court should deny review because petitioners' opposition to the Rule 12(b)(6) dismissal was "perfunctory," demonstrating that their claims on the merits are "groundless." Opp. 6 & n.3. We strenuously disagree for two reasons. First, in the district court, petitioners filed a detailed memorandum explaining why respondent's policy of not settling third-party insurance claims violated Louisiana law. *See* Mem. in Opp to Allstate's Motion to Dismiss (Doc. 8), in *Louque, et al. v. Allstate Ins. Co.*, No. 01-1282 (E.D. La.) (filed June 6, 2001). In the court of appeals, although petitioners' principal focus was the district court's lack of subject matter jurisdiction and thus its error in not remanding the case to state court, they devoted an entire section of their appellate brief to explaining why the district court erred, as a matter of Louisiana law, in granting the motion to dismiss. *See* Brief for Appellant, at 15-17, in *Louque, et al. v. Allstate Ins. Co.*, No. 01-30857 (5th Cir.) (filed Sept. 18, 2001) (argument heading: "The District Court Committed Manifest Error in Granting Allstate's Motion to Dismiss Class Action

Petition").

Second, and more fundamentally, petitioners would have been within their rights to challenge only the district court's failure to remand the class action back to state court. If, as petitioners maintain, the district court lacked subject matter jurisdiction when it considered the Rule 12(b)(6) motion, the district court's resolution of the Louisiana law issues presented in petitioners' state court complaint is irrelevant. And that is certainly true at this juncture, where the only question is whether the district court erred in exercising subject matter jurisdiction and depriving petitioners of the right to have their claims adjudicated in the Louisiana courts.[3]

CONCLUSION

The petition for a writ of certiorari should be granted.

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[3]Respondents seek support from this Court's denials of review in *Grant v. Chevron Phillips Chemical Co.*, 309 F.3d 864 (5th Cir. 2002), *cert. denied*, 122 S. Ct. 1634 (2003), and *Gibson v. Chrysler Corp.*, 261 F.3d 927 (9th Cir. 2001), *cert. denied sub nom., DaimlerChrysler Corp. v. Gibson*, 534 U.S. 1104 (2002). But as explained in the petition (at 7-8 n.2 and 9 n.3, respectively), *Grant* presented only state-law issues, and *Gibson* presented the question whether diversity jurisdiction in a class action may be maintained when the *named* plaintiff does not have more than $75,000 in controversy, an issue on which the courts of appeals were not (and are not) in conflict. *See* Resp. Br. in Opp., at 3-5, in *DaimlerChrysler Corp. v. Gibson*, No. 01-688 (filed Dec. 10, 2001).

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